Kamran Nemati Hossein v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05–11–01 OF 2013 & B-05–12–01 OF 2013
AZIAH ALI, TENGKU MAIMUN AND AHMADI ASNAWI JJCA
11 FEBRUARY 2015

Criminal Law — Dangerous drugs — s 39B(1)(a) — Trafficking — Trafficking in methamphetamine weighing 1,483g — Appeal against conviction and sentence — Drugs hidden in the inner wall of both bags — Trial judge's findings at end of prosecution's case — Whether prosecution evidence sufficient to establish prima facie case against first appellant — Whether trial judge erred in evaluation of first appellant's evidence — Whether failed to rebut the presumption of trafficking on a balance of probabilities — Whether second appellant's defence that he had no knowledge of drugs established — Whether raised reasonable doubt on prosecution's case — Whether second appellant's conviction safe — Whether appellate intervention justified — Dangerous Drugs Act 1952 s 39B(1) — Criminal Procedure Code s 182A

The appellants were jointly charged in the High Court for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read together with s 34 of the Penal Code. They were convicted and sentenced to death. Against the conviction and sentence, the appellants filed separate appeals and this court heard both appeals together. The case for the prosecution were that on the date in question, SP3 and five other policemen who were conducting an operation at the luggage claim at the KLIA Terminal, observed the two appellants acting suspiciously. When they were apprehended, the appellants looked fearful. A body search was then conducted on both the appellants but nothing incriminating was found on them. The two bags which were not locked and had the name tags of the first appellant only contained a few items of clothing and toiletries. The clothes were said to fit the appellants well. At the interior side wall of the bags, SP3 found two clear plastic packages in each of the bags hidden in the inner wall. Each package contained crystallite powders which were later confirmed by the chemist to be methamphetamine weighing a total of 1,483g. Considering the manner the drugs were concealed, the conduct of the appellants when they were apprehended and the weight of the drugs, the trial judge found that the appellants had mens rea possession of the drugs and accordingly invoked s 37(da) of the Act to find a case of trafficking. The essence of the first appellant's defence was that he was an innocent carrier. The first appellant stated that Mustafa, his friend whom he met in Syria, had given him two empty suitcases and that upon enquiries, Mustafa told him that the suitcases contained medication which was hidden to avoid tax. The appellant

was asked by Mustafa to deliver the bags to Amir in Malaysia. The first appellant further stated that the second appellant was merely tagging along. The second appellant testified that his purpose of coming to Malaysia was to tour the country. He denied having anything to do with the two bags containing the drugs. He stated that he only carried with him the sling bag and that his clothes were in the sling bag. The trial judge found that the defence of the appellants did not create a reasonable doubt on the prosecution's case and did not rebut the presumption of trafficking. Before this court it was argued on behalf of the first appellant that the trial judge had failed to adequately consider all the evidence available, including evidence favourable to the defence namely, that the bags were not locked, the conduct of the appellants was not mentioned in the police report and that there was no caution administered to the appellants under s 37A(1) of the Act. It was contended that had a maximum evaluation been carried out at the end of the prosecution case by the trial judge, the evidence would have disclosed at most, an offence of passive possession under s 39A(2) of the Act. For the second appellant, it was contended that the trial judge had not considered the following evidence; that it was the first appellant who was pushing the trolley, that the baggage tags were in the name of the first appellant, the defence of the second appellant that he was merely following the first appellant as a tourist was consistent with his cautioned statement, and that the second appellant's version of events were supported by the oral evidence and the cautioned statement of the first appellant.

Held, dismissing the appeal of the first appellant and allowing the appeal of the second appellant:

(1) The trial judge had correctly made a finding that a prima facie case had been made out against the appellants. There was no merits in the submissions for the first appellant that the trial judge had failed to consider that the evidence from all angles. The trial judge had not erred in her evaluation of the evidence and the application of the law. The evidence of the prosecution witnesses as a whole was sufficient to establish a prima facie case against the first appellant. Hence, there was no reason to intervene with the findings of the trial judge at the end of the prosecution's case (see para 19).

(2) The first appellant had not been consistent in his version. In his evidence in court, the first appellant stated that Mustafa handed the two bags to him at the Syria airport while in his cautioned statement, he stated that Mustafa had given him the bags at the Bus Terminal in Tehran. Looking at the evidence in totality, the defence was not reasonable; the defence failed to raise a reasonable doubt on the prosecution's case and failed to rebut the presumption of trafficking on a balance of probabilities (see para 21).

(3) As for the second appellant, the trial judge had failed to adequately consider his defence. Had the trial judge considered all the evidence as required under s 182A of the Criminal Procedure Code, Her Ladyship would have found that the defence of second appellant that he had no knowledge of the drugs had raised a reasonable doubt on the prosecution's case and that the conviction of the second appellant was not safe (see para 25).

[Bahasa Malaysia summary

Perayu-perayu dituduh secara bersama di Mahkamah Tinggi bagi kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') dibaca bersama-sama dengan s 34 Kanun Keseksaan. Mereka disabitkan atas kesalahan dan dijatuhkan hukuman mati. Terhadap sabitan dan hukuman, perayu-perayu memfailkan rayuan berasingan dan mahkamah ini membicarakan kedua-dua rayuan secara bersekali. Kes pendakwaan adalah bahawa pada tarikh tersebut, SP3 dan lima anggota polis yang menjalankan operasi tuntutan bagasi di Terminal KLIA, memerhatikan kedua-dua perayu bertindak secara mencurigakan. Semasa mereka diberkas, perayu-perayu kelihatan takut. Carian badan dijalankan ke atas kedua-dua perayu tetapi tiada apa-apa yang menunjukkan salah yang didapati pada mereka. Kedua-dua beg yang tidak berkunci dan mempunyai tag nama perayu pertama hanya mengandungi beberapa helai pakaian dan barangan mandi. Pakaian-pakaian tersebut muat dipakai oleh perayu-perayu. Pada bahagian dinding tepi dalam beg, SP3 menjumpai dua bungkusan plastik dalam kedua-dua beg yang tersorok disebalik dinding dalam. Setiap bungkusan mengandungi serbuk kristal yang kemudiannya disahkan oleh ahli kimia sebagai methamphetamine dengan jumlah berat 1,483g. Melihat pada cara dadah tersebut disorokkan, tindakan perayu-perayu ketika mereka diberkas dan berat dadah tersebut, hakim bicara mendapati bahawa perayu-perayu mempunyai mens rea milikan dadah dan dengan itu mengguna pakai s 37(da) Akta untuk membuat satu dapatan kes pengedaran. Inti pati pembelaan perayu adalah bahawa dia adalah pembawa tidak bersalah. Perayu pertama menyatakan bahawa Mustafa, rakannya yang dijumpai olehnya di Syria, telah memberikan dua bagasi kosong dan apabila ditanya, Mustafa memberitahunya bahawa bagasi-bagasi tersebut mengandungi ubat-ubatan yang disorok untuk mengelakkan bayaran cukai. Perayu diminta oleh Mustafa untuk menghantar beg-beg tersebut kepada Amir di Malaysia. Perayu pertama seterusnya menyatakan bahawa perayu kedua hanya sekadar mengikut sahaja. Perayu kedua memberi keterangan bahawa tujuannya datang ke Malaysia adalah untuk melancong di Malaysia. Dia menafikan mempunyai sebarang perkaitan dengan dua beg yang berisi dadah tersebut. Dia menyatakan bahawa dia sekadar membawa beg sandang tersebut dan pakaiannya berada dalam beg sandang. Hakim bicara memutuskan bahawa pembelaan perayu-perayu tidak membangkitkan satu keraguan munasabah ke atas kes pendakwaan dan tidak menyangkal anggapan pengedaran. Di mahkamah ini, dihujahkan bagi pihak perayu pertama bahawa

hakim bicara gagal untuk mempertimbangkan kesemua keterangan yang sedia ada dengan secukupnya, termasuk keterangan yang berpihak kepada pihak pembelaan khususnya, bahawa beg-beg tersebut tidak berkunci, tindakan perayu-perayu tidak disebut dalam laporan polis dan tiada amaran yang diberikan kepada perayu-perayu di bawah s 37A(1) Akta. Dihujahkan bahawa sekiranya penilaian maksimum dijalankan di akhir kes pendakwaan oleh hakim bicara, keterangan akan mendedahkan, paling tidak, satu kesalahan milikan pasif di bawah s 39A(2) Akta. Bagi perayu kedua, dihujahkan bahawa hakim bicara tidak mempertimbangkan keterangan berikut; bahawa perayu pertama yang menolak troli; bahawa tag-tag bagasi adalah di bawah nama perayu pertama; pembelaan perayu kedua bahawa dia sekadar mengikut perayu pertama sebagai pelancong adalah selari dengan pernyataan beramarannya; dan bahawa versi kejadian-kejadian oleh perayu kedua disokong oleh keterangan lisan dan kenyataan beramaran perayu pertama.

Diputuskan, menolak rayuan perayu pertama dan membenarkan rayuan perayu kedua:

(1) Hakim bicara telah dengan betul membuat dapatan bahawa satu kes prima facie telah dibuktikan terhadap perayu-perayu. Tiada merit dalam hujahan perayu pertama bahawa hakim bicara telah gagal mempertimbangkan keterangan dari pelbagai sudut. Hakim bicara tidak terkhilaf dalam penilaian beliau ke atas keterangan dan pemakaian undang-undang. Keterangan saksi-saksi pendakwaan secara keseluruhannya cukup untuk membuktikan satu kes prima facie terhadap perayu pertama. Oleh itu, tiada sebab untuk campur tangan dengan dapatan-dapatan hakim bicara di akhir kes pendakwaan (lihat perenggan 19).

(2) Perayu pertama tidak konsisten dalam versinya. Dalam keterangannya di mahkamah, perayu pertama menyatakan bahawa Mustafa telah menyerahkan dua beg kepadanya di lapangan terbang Syria sedangkan dalam kenyataan beramarannya, dia menyatakan bahawa Mustafa telah memberikan beg-beg tersebut di terminal bas di Tehran. Melihat pada keterangannya secara keseluruhan, pembelaan tidak munasabah; pembelaan gagal membangkitkan keraguan munasabah ke atas kes pendakwaan dan gagal untuk menyangkal anggapan pengedaran atas imbangan kebarangkalian (lihat perenggan 21).

(3) Bagi perayu kedua, hakim bicara gagal untuk mempertimbangkan pembelaannya dengan cukup. Sekiranya hakim bicara mempertimbangkan kesemua keterangan seperti yang diperlukan di bawah s 182A Kanun Tatacara Jenayah, beliau akan memutuskan bahawa pembelaan perayu kedua bahawa dia tidak mempunyai pengetahuan mengenai dadah-dadah tersebut telah membangkitkan keraguan munasabah ke atas kes pendakwaan dan bahawa sabitan perayu kedua

adalah tidak selamat (lihat perenggan 25).]

Notes

For cases on s 39B(1)(a), see 4(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 400–608.

Cases referred to

Danny Phiri v Public Prosecutor [2012] 1 LNS 437, CA (refd)
Mohd Shukri bin Abu Seman @ Hashim v Pendakwa Raya [2012] 1 LNS 433, CA (refd)

Legislation referred to

Criminal Procedure Code s 182A
Dangerous Drugs Act 1952 ss 9, 37(da), 37(da)(vi), 37A(1), 39A(2), 39B(1)(a)
Evidence Act 1950 s 8(2)
Penal Code s 34

Appeal from: Criminal Trial No 45A-232 of 2010 (High Court, Shah Alam)

Ariff Azami bin Hussein (Azizul & Ariff) in Criminal Appeal No B-05–11–01 of 2013 for the appellant.
Dalira bt Din (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal No B-05–11–01 of 2013 for the respondent.
N Sivananthan (Tina Ong with him) (Sivananthan) in Criminal Appeal No B-05–12–01 of 2013 for the appellant.
Dalira bt Din (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal No B-05–12–01 of 2013 for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The appellants were jointly charged in the High Court at Shah Alam for the offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read together with s 34 of the Penal Code. They were convicted and sentenced to death. Against the conviction and sentence, the appellants filed separate appeals. We heard both appeals together. In this judgment, we will refer to the appellant in Appeal No B-05–11–01 of 2013 and B-05–12–01 of 2013 as the first appellant and the second appellant respectively. They were the first accused and the second accused respectively in the High Court.

[2] The case for the prosecution as set out by the learned trial judge was as follows. On 22 July 2010, ASP Zamri bin Razak (SP3) and five other policemen were conducting an operation at the luggage claim area G at the KLIA Terminal, when he observed two men (later identified as the appellants) were acting suspiciously. The appellants seemed hesitant to leave the luggage

claim area and were continuously casting furtive glances left and right. When they finally decided to leave, the first appellant was seen pushing a trolley with two bags on it. The second appellant, who had with him a sling bag, was closely following the first appellant.

[3] The appellants were apprehended and according to SP3, they looked fearful ('sedikit takut'). The appellants were brought to the airport narcotics office for examination. A body search was done on both the appellants. Nothing incriminating was found on them. SP3 examined the two bags (exhibits P29 and P48) which had the name tags of the first appellant. The bags were not locked but the keys were recovered from the trouser's pocket of the first appellant. There were only a few items of clothing and toiletries in both bags. The clothes were said to fit the appellants well.

[4] SP3 found the interior side wall of the bags thicker than ordinary bags. Upon further examination of both exhs P29 and P48, SP3 found two clear plastic packages in each of the bags (exhs P20 and P24; exhs P11 and P15 respectively) hidden in the inner wall. Each package contained crystallite powders which were later confirmed by the chemist (SP3) to be Methamphetamine weighing a total of 1,483g.

[5] At the end of the prosecution's case, having considered the manner the drugs were concealed, the conduct of the appellants when they were apprehended and the weight of the drugs, the learned trial judge found that the appellants had mens rea possession of the drugs. Her Ladyship then invoked s 37(da) of the Act to find a case of trafficking. The appellants were called upon to enter their defence.

[6] Both appellants gave evidence under oath. The essence of the first appellant's defence was that he was an innocent carrier. He had travelled from Tehran to Syria by bus. At Syria airport, the fist appellant met his friend, Mustafa. The first appellant stated that Mustafa had given him two empty suitcases and that upon enquiries, Mustafa told him that the suitcases contained medication which was hidden to avoid tax. The appellant was asked by Mustafa to deliver the bags to Amir in Malaysia. The first appellant further stated that the second appellant was merely tagging along.

[7] The second appellant testified that his purpose of coming to Malaysia was to tour the country. He denied having anything to do with the two bags containing the drugs. He stated that he only carried with him the sling bag and that his clothes were in the sling bag.

[8] The learned trial judge found that the defence of the appellants did not create a reasonable doubt on the prosecution's case and did not rebut the

presumption of trafficking. The appellants were thus convicted and sentenced to death.

THE APPEAL

[9] Before us, the appellants raised only one ground of appeal. For the first appellant, learned counsel argued that at the end of the prosecution's case, the learned trial judge had failed to adequately consider all evidence available, including evidence favourable to the defence.

[10] It was the submission of learned counsel for the first appellant that the learned trial judge failed to consider the evidence from all angles, in particular the following evidence, which learned counsel contended was favourable to the defence:

(a) the bags were not locked;

(b) there was a doubt on the oral evidence of SP3 as regards the conduct of the appellants as the conduct was not mentioned in the police report (exh D67); and

(c) the fitting exercise was flawed as the instruction to do the fitting was given by SP4 to the appellants by hand signal. The appellants were not conversant in English and there was no Iranian interpreter to assist the appellants. There was also no caution administered to the appellants under s 37A(1) of the Act.

[11] Learned counsel for the first appellant argued that had a maximum evaluation been carried out at the end of the prosecution case by the learned trial judge, the evidence disclosed at most, an offence of passive possession under s 39A(2) of the Act. Learned counsel therefore urged us to substitute the conviction with one of possession.

[12] For the second appellant, the complaint was that the learned trial judge had failed to consider the defence. Learned counsel submitted that the learned trial judge had not considered the following evidence:

(a) that it was the first appellant who was pushing the trolley;

(b) that the baggage tags were in the name of the first appellant;

(c) that the defence of the second appellant that he was merely following the first appellant as a tourist was consistent with his cautioned statement; and

(d) that the second appellant's version of events were supported by the oral evidence and the cautioned statement of the first appellant.

A OUR DECISION

[13] Having considered the submissions of the parties and having perused the records of appeal, we unanimously dismissed the appeal of the first appellant and we allowed the appeal of the second appellant. We now give our reasons for the said decision.

[14] At the end of the prosecution's case, we found that the learned trial judge had correctly made a finding that a prima facie case had been made out against the appellants. In particular, the learned trial judge had considered the element of possession as follows (*Rekod Rayuan Jld 5*: p 435):

> In order to prove that both accused were having possession of the drugs, the prosecution has to establish that both accused had custody or control over the bags, and they knew that dangerous drugs were stored in the bags.
>
> The two bags (exhs P29 and P48) were checked-in under the 1st accused's name as seen in the luggage tags (exhs P34 and P58). The luggage collection tags (exh P48), the passports and electronic tickets were found with the 1st accused. The particulars such as passenger's name, flight number and the number of checked-in luggage printed on both luggage tags (exhs P34 and P58) were consistent with the particulars on the passenger electronic tickets and luggage collection tags. Though the second luggage bag (exhs P48) was checked-in under the name of the 1st accused, the evidence also showed that the 2nd accused had control over the bag. According to the investigating officer SP4, the 2nd accused picked out the clothes found in the second luggage bag and the clothing matched him. Based on SP3's observation, the 2nd accused was with the 1st accused all the times. His travelling documents were also found with the 1st accused. Therefore, the court is satisfied that both accused had control or custody over the bags containing the drugs.

[15] The learned trial judge further stated that (*Rekod Rayuan Jld 5*: p 436-437):

> Counsel for the 2nd accused contended that the evidence revealed that the bags belonged to the 1st accused. The 2nd accused only had a sling bag with him. It was also put to SP4 that the clothing during the tryout session was taken from the sling bag (in which she disagreed). His caution statement (exh D71) was tendered to support his contention that the purpose of the visit to Malaysia was to tour the country.
>
> The court found that, the defense's contentions did not dwell well with the prosecution's evidence. As explained by SP3, only toiletries and personal hygienic products were found in the sling bag. This piece of evidence was not challenge by the defense.
>
> Eventhough exhibit D71 was admitted, it was an exculpatory statement. At this stage, the court could not rely on this statement to acquit the 2nd accused as the statement was not tested in cross-examination ...
>
> ...

The drugs were cunningly concealed. The crystalline methamphetamine were absorbed into the fabric and carefully wrapped with clear plastic sheet. The packages were well hidden inside the interior side walls of both bags. The fabric covering the surface was lined perfectly to the interior side wall. According to SP3, there was nothing suspicious about the interior side walls of both bags if one were to examine it with the naked eye. SP3 only felt that the interior side walls were thicker when he touched the surface of the interior with his hand. It was to avoid detection of the authorities. (Ref to *Public Prosecutor v Abdul Rahman Akif* [2007] 4 CLJ 337 (FC) and *Teh Hock Leong v Public Prosecutor* [2008] 4 CLJ 764 (FC)).

[16] The learned trial judge had also considered the issue of conduct when Her Ladyship said (*Rekod Rayuan Jld 5*: p 438):

According to SP3, both accused were acting suspiciously because they were keeping a look-out at the luggage claim area. They also look fearful when they were apprehended by the police. In the present case, the conduct of both accused was not taken in isolation but together with all the other facts and circumstances of the case. The drugs were discovered in the bags in which both accused had physical control or custody over them. Clothes that fitted both accused were also recovered. Their conduct and reaction were clearly admissible under s 8(2) of the Evidence Act 1950. The evidence assisted the prosecution and strengthened the inference that both accused had knowledge of the offending drugs at the material time (Also ref *Parlan Dadeh v Public Prosecutor* [2009] 1 CLJ 717)

Their conduct and reaction, considered in the light of the evidence adduced, justifiably necessitated some explanation from them pursuant to s 9 of the same Act ...

In the present case, the defence attempted to discharge the onus in the course of the prosecution's case, by way of cross-examination of SP3 and SP4. The defence tried to explain that the accused were unfamiliar with the airport surrounding. However, SP5 (the Immigration Officer) informed the court that the 1st accused had came to Malaysia twice (on 29 April 2010 and 16 May 2010) prior to the present visit. The 2nd accused was travelling together with an experienced traveller. Therefore there was no reason for them to behave in that manner.

[17] We found no merits in the submissions of learned counsel for the first appellant that the learned trial judge had failed to consider that the evidence from all angles. The learned trial judge had considered the facts highlighted by the defence when Her Ladyship stated that (*Rekod Rayuan Jld 5*: p 439):

The defence also raised several facts and invited the court to make favourable inference that both the accused had no knowledge of the offending drugs i.e. (1) the packages were not effectively hidden; (2) the bags were not locked; and (3) both accused remained silent throughout the examination.

The court referred to the case of *Tan Ong Keong v Public Prosecutor* [2012] 4 CLJ 223 in which the Court of Appeal stated as follows:

[19] We accept the submission that the facts relied upon can give rise to the inference that he had no knowledge of the presence of the proscribed substance

> in the bag or its nature as a proscribed substance. We recognise, however, that except in the case of the clearest and most direct proof of guilt, almost all other combination of facts are always capable, at the same time, of an inference of guilt as well as innocence. To put it another way, it is always possible to structure an interpretation or inference consistent with innocence. But if in every case an accused is acquitted simply because of it is possible to construct such an interpretation or inference, the law cannot be enforced ...

[18] As for the element of trafficking, the learned trial judge found that since the weight of methamphetamine exceeded the statutory limit of 50 grams, the presumption pursuant to s 37(da)(vi) of the Act was triggered to raise a case of trafficking.

[19] In our judgment, the learned trial judge had not erred in her evaluation of the evidence and the application of the law. As regards the police report, it was our view that the omission or the alleged inconsistencies highlighted by the learned counsel did not affect the prosecution's case (see *Danny Phiri v PP* [2012] 1 LNS 437; *Mohd Shukri bin Abu Seman @ Hashim v PP* [2012] 1 LNS 433). Even without the fitting exercise and the evidence of SP3 on the conduct, we were of the view that the evidence of the prosecution witnesses as a whole was sufficient to establish a prima facie case against the appellant. We found no reason to intervene with the findings of the learned trial judge at the end of the prosecution's case.

[20] Insofar as the first appellant was concerned, we found no appealable error in the evaluation of the defence and in the following findings of the learned trial judge (*Rekod Rayuan Jld 5*: pg 447–448):

> The 1st accused informed the court that Mustafa stayed in Sajad Street in Tehran. It goes against common sense for Mustafa to travel all the way to Syria airport just to hand over the suitcases to the 1st accused. If it was true that both bags belonged to Mustafa who had entrusted them to the 1st accused at the Syria airport, where was the 1st accused's own bag? Where did he keep his clothing and personal belongings during his journey from Tehran to Syria? ...
>
> If the bags belonged to Mustafa, there was no explanation as why the lock (ex P39A) was found in the 1st accused's trouser's pocket, and why he had a lock with no bag of his own. Why would the 1st accused put his own clothes and personal belongings in Mustafa's bags?
>
> Thus, all in all, the court found that Mustafa as claimed by the 1st accused to have given time the incriminating bags does not exist. It was a crafted defence to throw the blame onto the fictitious character because the 1st accused was caught red-handed with the drug.

[21] Further, we noted that the first appellant had not been consistent in his version. In his evidence in court, the first appellant stated that Mustafa handed

the two bags to him at the Syria airport (*Rekod Rayuan Jld 2*: pg 114) while in his cautioned statement, he stated that Mustafa had given him the bags at the Bus Terminal in Tehran (*Rekod Rayuan Tambahan 1*: pg 22). Looking at the evidence in totality, we agreed with the learned trial judge that the defence was not reasonable; that the defence failed to raise a reasonable doubt on the prosecution's case and failed to rebut the presumption of trafficking on a balance of probabilities.

[22] In respect of the second appellant, the learned trial judge made the following finding at the end of the defence case (*Rekod Rayuan Jld 5*: pg 451):

> The 2nd accused arrived on 22.7.2010 and was scheduled to return on 26.7.2010. According to SP3's evidence, the items that were covered from the 2nd accused's sling bag (exhibit P59) were 1 towel, a phone charger, a hair gel, and a small pouch containing toiletries. The defence did not challenge this fact. If the defence' contentions were true, the court found it strange as the 2nd accused did not bring any spare clothing for his 4 days visit to Malaysia. The court found that the 2nd accused's defence was merely bare words ...

[23] To recapitulate, the defence of the second appellant was that he was merely following the first appellant to come to Malaysia. His evidence that he came to Malaysia as a tourist and that he had no knowledge of the drugs was consistent with his cautioned statement (exh D71). The second appellant's version also found support in the oral evidence of the first appellant wherein the first appellant stated that (*Rekod Rayuan Jld 2*: p 117):

Q:	You said that Farshad just came as a tourist, right?
A:	Yes
Q:	Farshad doesn't know Mustafa?
A:	No
Q:	Farshad has no idea about your arrangement with Mustafa?
A:	No nothing
Q:	He don't know?
A:	No
Q:	Are you agree with me, Farshad gave you 1000 US dollar to buy ticket, anything, to bring him here?
A:	Yes I agree
Q:	So Farshad paid for his entire trip to Malaysia?
A:	Yes he is

A

Q: ... I put it to you, you make mistake when you said 'Mustafa told us' exactly Mustafa only told you about the bag, not Farshad. You agree with me?

A: Yes I agree.

B

[24] The second appellant's defence that he had no knowledge of the drugs was also consistent with the cautioned statement of the first appellant wherein the first appellant stated that (*Rekod Rayuan Tambahan*: p 23):

C

S: Dengan siapa kamu datang ke Malaysia?

J: DENGAN FARSHAD.

S: Adakah Farshad turut terlibat dengan dadah yang dibawa oleh kamu?

J: TIDAK DAN TIDAK TAHU APA-APA.

D

[25] Having perused the grounds of judgment, we found that nowhere did the learned trial judge consider the above evidence. We therefore agreed with learned counsel that the learned trial judge had failed to adequately consider the defence. Had the learned trial judge considered all the evidence as required under s 182A of the Criminal Procedure Code, Her Ladyship would have found that the defence of second appellant that he had no knowledge of the drugs had raised a reasonable doubt on the prosecution's case and that the conviction of the second appellant was not safe.

E

F

[26] In the light of all the above, we were unanimous in our decision that the appeal of the first appellant be dismissed. We affirmed the conviction and sentence of the High Court on the first appellant. The appeal by the second appellant was allowed. We set aside the conviction and sentence of the High Court. The second appellant was acquitted and discharged.

G

Appeal by first appellant dismissed and appeal by second appellant allowed

Reported by Ashgar Ali Ali Mohamed

H

I